Cambridge Contracting, Inc. and Cambridge Chemical Corp. *and* Fred Ens, Jr., Paul P. Pruss & Son, Inc., and Fred Ens, Sr.

Cambridge Contracting, Inc. *and* Fred Ens, Sr. Cases 22-CA-9254, 22-CA-10198, and 22-CA-10354

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 29, 1981, Administrative Law Judge Joel P. Biblowitz issued the attached Decision in this proceeding. Thereafter, Charging Party Fred Ens, Sr., filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

IT IS FURTHER ORDERED that the informal settlement agreement entered into between the parties on January 24, 1980, and vacated and set aside by the Regional Director for Region 22 of the National Labor Relations Board on November 26, 1980, be, and it hereby is, reinstated.

[1] Charging Party Ens, Sr., has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge: This case was heard before me in Newark, New Jersey, on May 26 and 27, 1981. An order consolidating cases, first amended complaint issued on November 26, 1980, based on charges filed as follows: Case 22-CA-9254 was filed on May 29, 1979, and amended on July 5, 1979; Case 22-CA-10198 was filed on August 5, 1980, and amended on October 9, 1980; Case 22-CA-10354 was filed on October 20, 1980. The complaint alleges that Cambridge Chemical Corp., herein called Respondent Chemical, and Cambridge Contracting, Inc., herein called Respondent Contracting, and at times collectively referred to as Respondent Cambridge, discharged Fred Ens, Jr., on or about May 3, 1979, because he joined or assisted Local 394, Laborers International Union of North America, AFL-CIO, herein called Local 394, and engaged in other concerted actions, and discharged Fred Ens, Sr., on May 18, 1979, because of the unfair labor practice charge filed by Ens Jr. regarding his discharge.[1] The complaint also alleges that Paul P. Pruss & Son, Inc., herein called Respondent Pruss, discharged or laid off Ens Sr., Ens Jr., and Golie Ricks on May 9, 1980, at the request of Respondent Cambridge, because they joined or assisted Local 394, engaged in other concerted actions, and because they filed or otherwise participated in a Board proceeding under the Act.

FINDINGS OF FACT

I. JURISDICTION

Respondent Contracting and Respondent Chemical, New Jersey corporations with their principal office and place of business at 11 West 21 Street, Linden, New Jersey, are affiliated business enterprises with common owners, directors, personnel, facilities, and a common labor policy. Admittedly, Respondent Contracting and Respondent Chemical constitute a single integrated business enterprise and a single employer within the meaning of the Act. Respondent Cambridge is engaged in the business of providing and performing tank cleaning, heavy equipment cleaning, light construction services, and related services. In the course of its business operations during the 12-month period preceding November 1980, Respondent Cambridge caused to be purchased and delivered to its Linden office cleaning equipment and materials, and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported to said Linden office in interstate commerce directly from outside the State of New Jersey.

Respondent Pruss, a Pennsylvania corporation with its principal office in Elizabeth, New Jersey, is engaged in the business of providing and performing tank cleaning services and related services. During the calendar year 1979 Respondent Pruss provided and performed tank cleaning services valued in excess of $50,000 for enterprises including, *inter alia*, Exxon Company, U.S.A., located within the State of New Jersey, which enterprises, including Exxon Company, U.S.A., are directly engaged in interstate commerce. It is admitted, and I find, that Respondent Cambridge and Respondent Pruss are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[1] An allegation in the complaint that Respondent Cambridge granted an unlawful wage increase was withdrawn at the hearing.

II. THE LABOR ORGANIZATION INVOLVED

Respondents admit, and I find, that Local 394 is a labor organization within the meaning of Section 2(5) of the Act.

III. BACKGROUND

On May 3, 1979, Respondent Cambridge discharged Ens Jr. allegedly because of his activities on behalf of Local 394 or his other concerted activities; on May 4, 1979, Ens Jr. filed an unfair labor practice charge with the Board regarding his discharge. On May 18, 1979, Respondent Cambridge discharged Ens Sr. allegedly because of his participation in, and in reprisal for, the unfair labor practice charge filed by Ens Jr. On or about January 24, 1980, prior to the unfair labor practice hearing in the matter, Ens Jr. and Respondent Cambridge entered into an informal settlement agreement (approved by the Regional Director) providing for, *inter alia*, certain moneys to be paid to Ens Sr. and Ens Jr. and a notice providing, *inter alia*:

> WE WILL NOT discharge or otherwise discriminate against our employees because of their membership in, activities on behalf of, and support for, Local 394, Laborers' International Union of North America, AFL-CIO, or any other labor organization.
>
> WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act.

Prior to the execution of this informal settlement agreement, Ens Jr., Ens Sr., and Ricks had obtained employment with Respondent Pruss. On May 9, 1980, Respondent Pruss discharged Ens Sr. and Ricks and laid off Ens Jr. The complaint alleges that Respondent Pruss discharged or laid off Ens Jr., Ens Sr., and Ricks because it was requested to do so by Respondent Cambridge for the same alleged reasons that Respondent Cambridge discharged Ens Jr. and Ens Sr.—their concerted activities and their filing of charges and participating in Board proceedings under the Act. On November 26, 1980, the Regional Director withdrew approval of, and vacated and set aside, the informal settlement agreement dated January 24, 1980, and incorporated the original allegations of the May 1979 discharges in the consolidated amended complaint issued on November 26, 1980. The moneys paid by Respondent Cambridge to Ens Jr. and Ens Sr. pursuant to the informal settlement agreement were not returned to Respondent Cambridge.

The attorney for Respondent Cambridge (who at the instant hearing represented all the Respondents) filed an undated brief and notice of motion requesting "that the Order withdrawing approval of the settlement agreement should be vacated, as a matter of law or, in the alternative, a severance of that proceeding should be granted from the unfair labor practice charges separately issued as against Pruss and Cambridge arising out of the discharge by Pruss of employees Ens Sr., Ens Jr., and Golie Ricks and an initial hearing held before a different Administrative Law Judge." On May 18, 1981, John M. Dyer, Associate Chief Administrative Law Judge, issued an order where he stated:

> IT IS HEREBY ORDERED that the Motion be denied. One question to be decided is whether the terms of the settlement agreement were violated by the actions alleged in complaint paragraphs 20 and 21. If the Judge decides that such actions violated the terms of the settlement agreement as alleged in complaint 22, he thereby finds that the settlement agreement was properly set aside. If the Judge finds that the actions did not violate the terms of the settlement agreement, then it will be ordered reinstated. Respondent is not prejudiced by so proceeding since this is the threshold question. For this reason and the reasons expressed in Counsel for the General Counsel's Opposition Memorandum, Respondent's Motion and Alternative Motion must be denied.

On the basis of this order, after the discussion of all the facts herein (including the discharge by Respondent Cambridge of Ens Sr. and Ens Jr.), the first subject under my analysis and conclusion will be whether Respondent Cambridge violated the terms of the earlier settlement agreement entered into on January 24, 1980, with Ens Sr. and Ens Jr.

IV. THE FACTS

Ens Sr. began his employ with Respondent Contracting in or about 1970; at the time he was terminated, on May 18, 1979,[2] his title was supervisor, contracting. Ens Jr. began working for Respondent Contracting part-time in 1974 and 1976; he was hired by Respondent Contracting as a full-time employee in January 1977 and was employed as a working foreman. While the parties agree that Ens Jr. was not a supervisor within the meaning of Section 2(11) of the Act during the period in question, Respondents allege that Ens Sr. was a supervisor within the meaning of Section 2(11) of the Act during his employment with Respondent Cambridge; the General Counsel appears to urge that Ens Sr. was not a supervisor within the meaning of the Act during that period.

Ens Sr. was paid an hourly rate of $5.20; Ens Jr. was earning $4 an hour while many of the laborers employed by Respondent Cambridge earned from $3.65 to $4.50 an hour. Respondent Cambridge's operation involved performing chemical cleaning and maintenance work at the Exxon Refinery in Linden, New Jersey. Ens Sr, met on a daily basis with an Exxon coordinator, who informed him of the next day's assignments. Ens Sr. then decided on the required number of men and trucks needed for the job. (Most of the laborers on these jobs were temporary help from an employment service.) He has not hired or fired employees. He testified that he has not recommended that employees be discharged; on one occasion he informed Paul Oriel, vice president and general manager and an admitted agent of Respondent Cambridge, that he had caught an employee sleeping in the truck on

[2] Unless otherwise indicated, all dates mentioned herein are for the year 1979.

three occasions; the employee was not discharged. When the Exxon coordinator informs him that he wants the Cambridge employees to continue working past the usual 4:30 quitting time, he (Ens Sr.) would ask the entire crew to remain on the job. If some of these employees refused this request, Ens Sr. would sometimes ask some of the other employees to work the overtime hours; Oriel also chose employees to work overtime. When asked how he decided whom to ask, Ens Sr. testified: "No particular way." He also testified that some employees are better at certain tasks than other employees and that he would take that into consideration in choosing employees to work overtime: "some guys are afraid of heights. You can't put them on a tower." Ens Sr.'s supervision is only over the employees of Respondent Contracting; if he could not locate enough employees to work overtime at any particular time, he would notify Oriel who would request employees of Respondent Chemical[3] to work overtime. Oriel testified that Ens Sr. could, and has, recommended that certain employees be discharged, but on the few occasions that he has so recommended it was not followed because the employees were long-term employees at the time; he could not remember any occasion where Respondent Cambridge followed Ens Sr.'s recommendation to discharge an employee, but his recommendations were given careful consideration. Respondent Contracting has 9 or 10 employees; Oriel and Frank Riley, president of Respondent Cambridge, appear to be the only agents of Respondent Cambridge on the corporate hierarchy above Ens Sr. at the time.

I would find on the basis of the above that Ens Sr. was not a supervisor within the meaning of Section 2(11) of the Act at the time in question. It is clear that he could not hire or fire employees and that he never effectively recommended the discharge of any employee; although his recommendations were given "careful consideration" there was no evidence that they were ever followed. His decision on the number of employees to be employed each day was strictly dictated by the stated demands of the Exxon coordinator. Additionally, it appears to me that the only activity engaged in by Ens Sr. that could be considered out of the ordinary, was, on occasion, selecting employees to work overtime, but even that required little, if any, independent judgment; rather, these decisions appear to be rather pedestrian and predictable in nature. These findings, together with the fact his salary is not appreciably higher than many of the other employees, together with the fact that Oriel and Riley are also available to supervise the 9 to 10 employees of Respondent Contracting, convince me that he was not a supervisor within the meaning of the Act.

On April 30, at or about 7:30 a.m., prior to beginning work, about seven or eight of Respondent Contracting's employees were discussing the need for raises. Ricks said that they should agree on an amount of a raise that they desire and approach Riley with it and everybody agreed at that time that it was a good idea. During the employees' 10:30 a.m. break at the Exxon refinery they continued discussing the possibility of approaching Riley with certain demands and one of the employees of Respondent Contracting, Joe Miller, informed Ens Jr. that they had no power to approach Riley with any demands. Ens Jr. decided that Miller was correct and he told the other employees that maybe they should contact a union. All the other employees agreed except Miller who argued that he was better off without a union because he needed the overtime hours he worked in order to survive; Ens Jr. and another employee informed Miller that if a union obtained good increases for them he would not have to work so much overtime. At lunchtime that day the employees got together again and Ens Jr. decided to "test" the employees' resolve regarding a union. In this regard he took a blank piece of paper and signed it; he handed it to Ricks, who also signed it. When he gave it to the other employees: "I just said here, sign this piece of paper, please," although, again, the paper contained nothing but signatures.[4] All the employees present signed the paper except Miller; Ens Jr. told Miller, "everybody else signed this piece of paper, Joe. Why don't you put your name on it?" Miller refused. When Miller asked what the paper was for, Ens Jr. said it was nothing, just a piece of paper with a list of names. Miller again refused and Ens Jr. threw away the paper. Later that day, Ens Jr. learned that Mike Sherrick, one of the employees who signed his blank piece of paper, was fired at lunchtime.[5] During the afternoon break Miller approached Ens Jr. and told him that he did not know how it happened, but Oriel found out about the list. Ens Jr. said that there was only one way he could have found out, and that was through Miller, but Miller denied it.

Ens Sr. testified that at lunchtime that day he observed Miller sitting in front of one of Respondent Cambridge's buildings speaking with Oriel. He overheard Miller telling Oriel that he was not able to live on 40 hours pay, but he did not hear anything that Oriel said.

On May 3, during lunchtime, the employees again discussed contacting a union or speaking to Riley about getting more money. It was decided that they would meet that evening at a local bar and that, prior to that meeting, Ens Jr. and Ricks would attempt to contact a union. That same day Ens Jr. and Ricks picked Local 394's telephone number from the phone book. While they were at the Exxon refinery they went together to a public telephone where Ricks called the Local 394 office. A woman answered the phone and Ricks informed her who he was and where he worked, and that they were having problems on the job; she told him that his first step should be to get in touch with the Labor Board. She also

[3] Respondent Contracting performed general cleanup work at the refinery, while Respondent Chemical performed specific jobs using chemicals to clean tanks and towers.

[4] Ens Jr. testified: "Well, if you were one of the regular employees of Cambridge at the time, and was—how could I say it—had worked with myself for a year or two at the time and knew there was talk of union going around, and therefore knew that there was nothing to fear by signing this piece of paper."

[5] The circumstances surrounding his discharge will not be discussed herein. Although he was paid $1,000 pursuant to the settlement of the prior matter on January 24, 1980, he is not named in the consolidated amended complaint. It should also be noted that in other parts of the record there is testimony that Sherrick was discharged on May 3; this seems more reasonable as Ens Jr. testified that Sherrick was present at a meeting on May 3 with the other employees.

informed Ricks that he should call back the following Monday.

On that same day at or about 3 p.m., Ens Sr. returned to Respondent Cambridge's Linden facility to work on the daily timesheets, which are submitted by Respondent Cambridge to Exxon for reimbursement for work performed. Riley said to him, "The shit hit the fan over at the refinery, didn't it Freddy?" and Ens Sr. asked him what he was talking about. Riley then said that he did not know who was causing all the trouble: "It's that guy who comes out here." Ens Sr. thought he was referring to an individual named Matty Dudeck, but Riley said that it was not Dudeck, he was referring to an Exxon supervisor named Ronny Grue. Riley then said, "I have to let your son go tonight." When Ens Sr. asked why, Riley said, "we got a call from purchasing that him and Sherrick are dealing in dope." Ens Sr. protested and said that if it involved dope why did Exxon's purchasing department report on it rather than the more appropriate department, security. Riley then said, "well, we'll say it's his driving record, but in a month or so when this blows over, he can come back and work." Riley gave him Ens Jr.'s last checks; Riley never called Ens Jr. to inform him of his discharge.

When Ens Sr. went home that evening he informed his son that Riley said that he was fired for dealing in dope, but Riley would go along with calling it a discharge for a poor driving record. (That afternoon, when Ens Jr. finished work, he could not find his timecard to punch out). Ens Jr. told his father that the allegation was untrue, and he denied at the hearing that he had ever sold or used a controlled dangerous substance.

On May 4, Ens Jr. filed an 8(a)(1) charge with the Board against Respondent Contracting alleging that Respondent Contracting restrained and coerced its employees in the exercise of their Section 7 rights. This charge does not specifically allege that Ens Jr., the Charging Party, was discharged in violation of the Act.

Between May 6 and May 13, Ens Sr. went to speak with Riley, and before the discussion began, Oriel walked in. Ens Sr. told them that he had heard rumors that he and Ricks were the next ones to be discharged; Oriel said that it was not true. Ens Sr. then said that he had spoken to his son and he still was unsure whether to bring a lawsuit against them or Exxon. Riley then informed him that they had received notice of the unfair labor practice charge that Ens Jr. had filed. According to Ens Sr.'s testimony, Riley then said, "Who said anything about dope?" and Ens Sr. said, "You did." Riley asked Oriel if he (Riley) had said anything about dope and Oriel said that he had not. Ens Sr. protested and left.

Oriel testified that Ens Jr. was discharged for the following reasons: " . . namely because he would not work overtime for me. He had a poor driving record. He was caught in the refinery speeding many times by Frank Riley.[6] And he refused to listen to me, only to his father, and that and stories that were going around the shop at the time. As he was supplier for any type of drugs that you would want." Oriel testified that, within a week prior to Ens Jr.'s discharge, he was informed by Miller that he had purchased drugs from Ens Jr. Miller testified that he has purchased marijuana from Ens Jr. The closest he could estimate the time of this purchase was "within a year" of Ens Jr.'s discharge. He also testified that he reported this to Oriel, but he did not testify as to when he did so.

Oriel testified that Riley made the decision to discharge Oriel. Oriel also testified that he would not have recommended discharging Ens Jr. until he heard of the drug dealing, and at that time he recommended to Riley that he be discharged. He also admitted that he heard of the drug allegations regarding Ens Jr. a month prior to his discharge. Regarding one of Respondent Cambridge's other reasons for discharging Ens Jr.—his alleged refusal to work overtime—Oriel testified that he "almost always" refused to work overtime for him, while he did work overtime for his father.[7]

On May 18 Ens Sr. reported for work as usual. At or about 3:30, while he was preparing the daily reports, Oriel said to him, "it's layoff time." Ens Sr. said "layoff time?" and Oriel said "yes." Ens Sr. asked, "What reason are you giving for firing me?" Oriel said, "You are not doing your job." Ens Sr. asked him what he meant and Oriel repeated that he was not doing his job. Ens Sr. told Oriel that he would probably have another Labor Board case on his hands, and left. He testified that he had never been warned about his work performance prior to that.

Oriel testified that a number of reasons contributed to Ens Sr.'s discharge. One reason was:

> Fred Ens Sr. had a pickup truck he was allowed to take home every evening and weekends. In that pickup truck, he would carry, besides the gas in the truck itself, three or four or five gallon cans, which he used during the day to fill pumps or trucks that ran out of gas. Now, it seemed that every weekend he would fill up those cans and bring them back Monday morning empty. On top of that, on Sunday I came to work and he was filling up the cans on a Sunday morning with keys to the gas pump that he shouldn't have had, and to the office that he shouldn't have had, to unlock the electrical part of the gas pumps to start them up.

Oriel testified that this event occurred 2 or 3 months prior to the discharge of Ens Sr. and, after the event, he changed the keys on the gas pump and the office. He testified that the reason they did not discharge him at that time was that in about January there was an explosion at the Exxon refinery which tripled his work force. Although he had convinced Riley, by then, that Ens Sr. should be discharged, they could not do so until they could locate a replacement for him. In or about February, Oriel asked a retired Exxon coordinator to take the

[6] Riley did not testify.

[7] On cross-examination, Oriel testified that after he told Ens Sr. to inform Ens Jr. that he was fired, Ens Sr. told him that Ens Jr. was going to the Labor Board. I would find that Ens Sr. informed Oriel of this in a later conversation, not on May 3. For one thing, Ens Sr. never testified to this. Additionally, I find it unlikely that a person who has been given a double shock of hearing that his son has been fired, and for dealing in dope, would immediately answer that his son was going to the Labor Board.

job, but he refused. They therefore waited until the explosion cleanup was completed in mid-May and, at that time, discharged Ens Sr. and replaced him with Miller, at first on a temporary basis but, according to Oriel's testimony, 6 months later Miller was given the job permanently because he had performed the job well. Oriel was asked why he waited so long before replacing Ens Sr. with Miller when he knew in February that the retired Exxon coordinator would not take the job. He answered that he did not feel that Miller could handle the job earlier, with all the extra work caused by the explosion; however, by May that cleanup work had been completed. At that point in his testimony (in answer to a question from me, after direct and cross-examination) Oriel testified that for 3 months prior to Ens Sr.'s discharge they had complaints about their work under Ens Sr.'s supervision; they did not discharge him earlier because of the heavy workload.

Oriel also testified that, in early May, Ricks came into his office and said that, although he did not want to cause trouble, he wanted Oriel to know that Ens Jr. had made a statement in front of all the employees (during the country's gas shortage) that his family had no problem with gas because his father could take as much as he wanted out of there. Ricks testified that, on the day Ens Sr. was discharged, he (Ricks) called Ens Sr., who said that he was told that one of the reasons he was fired was because Ricks had told Riley that during the gas shortage Ens Jr. had made the statements that they did not have to worry about gas because his father got it from Respondent Cambridge. After Ens Jr. told Ricks this, Ricks went to Oriel's office where Miller was present, and told Oriel that he (Ricks) had not made the statement in question, that it was Miller who said it. According to Ricks' testimony, Miller made no denial and Oriel said that Riley was not going to let anybody run his business. Miller testified that he never heard Ens Jr. make the alleged statement about Ens Sr. taking gas from Respondent Cambridge nor did he inform anyone that Ens Jr. had made such a remark.

Oriel testified that the other reason Ens Sr. was discharged was because he persisted in doing his paperwork (the daily timesheets that are transmitted to Exxon for billing purposes) in the afternoon, when he should have performed the work in the morning. He testified that "quite a few times" he told Ens Sr. that he should not leave the job to do his paperwork; that he was paid a half hour overtime, daily, so that it would not interfere with his presence at the jobsite, and yet he continued to report back to Respondent Cambridge's office at 3 or 3:30 to perform his paperwork. Ens Sr. testified that he was supposed to do the paperwork anytime he had the chance and Oriel never complained to him that he should be at the jobsite with the other employees rather than doing the timesheets in Respondent Cambridge's office at 3:30

Ricks testified that on May 18, at or about 5:30 p.m., as he was walking toward the train station, Oriel stopped his car and gave him a ride to the station: "And in the course of my riding with him to the station he said there is not going to be no union at Cambridge."

Ricks left the employ of Respondent Cambridge in December. He was served with a subpena from General Counsel at the hearing in Case 22-CA-9254 on January 24, 1980; he appeared on that day at the Labor Board, as did Riley and his wife, Oriel, and Miller. Ricks did not speak to any of these people, and never testified as the case was settled prior to hearing by the payment of a total of $3,500 to Ens Sr., Ens Jr., and Sherrick and the posting of the Board notice, *supra*, which was complied with by Respondent Cambridge.

Ens Sr. was hired at Respondent Pruss on July 14 (there is no contention by Respondent Pruss that he was a supervisor within the meaning of the Act during his employment there); Ens Jr. was hired by Respondent Pruss on December 7;[8] Ricks, on December 31.

The next event of importance herein was a meeting between Oriel, Riley, and Victor Cappetta, manager of the chemical cleaning division of Respondent Pruss, and an admitted agent of Respondent Pruss; this meeting took place in Cappetta's office and he placed the time of the meeting as mid-April 1980. Also present at the time was Respondent Pruss' garage man. Cappetta testified that when Riley and Oriel walked into his office they were furious. Riley said that there was damage done to his equipment the previous night and "this nonsense has got to stop." Cappetta said that he knew nothing about it, and Riley said, "This has got to stop, otherwise I'll take my own actions." (He did not specify what these "actions" would be, nor did Cappetta ask him what actions he would take; Cappetta testified: "I didn't bother to ask him. Because at that time he was fit to be tied.") Cappetta asked Riley about 10 times who did the damage, but Riley would not tell him.

The only other witness to this conversation to testify, Oriel, testified that Riley told Cappetta (whom he had known for years) that there was some damage done to his equipment[9] and he was pretty sure he knew who did it. He wanted it known that he wanted it stopped and wanted no more. Cappetta asked Riley nine times whom he was referring to, but Riley refused to tell him. Oriel testified that he and Riley felt that Ens Jr. had done the damage to the truck because Miller told them that Ens Jr. had threatened to damage their equipment. (Miller did not testify regarding this subject.) Oriel testified that they spoke to Cappetta "to let them know we knew who did it and ask it to be stopped." Although Riley did not name Ens Jr., "I assumed that they knew the circumstances . . . of which Fred Ens, Jr. used to work for us." He also testified that they went to Cappetta to get a warning to Ens Jr. without him being singled out. They did not name Ens Jr. to Cappetta because of the prior Labor Board matter with him.

[8] The brief of Respondents states: "Ens Jr. started with Pruss on December 7, 1979, *after* the settlement aforesaid." That is not correct; Ens Jr. obtained his employment with Respondent Pruss 6 weeks prior to the settlement agreement.

[9] Oriel testified that one of Respondent Cambridge's vehicles had an oil drain hose cut in half while parked at the Exxon refinery the prior evening or that morning. Oriel saw it and testified that there was no doubt in his mind that it had been cut. Ens Sr. testified that, after this, he spoke with a mechanic of Respondent Cambridge who told him "somebody broke an oil line and it could have broke itself."

Ens Sr. testified that, about 2 days after this conversation, Cappetta told him that Riley and Oriel came to see him and told him that guys were tampering with his trucks. Cappetta asked who it was and Riley said, "You know who the guys are." Cappetta said that if he knew who they were he would not ask him and Riley said, "Who's the three guys that brought me up on charges to the Labor Board." Ens Sr.'s testimony continues: "Then he went on to say—Vic Cappetta—that Frank Riley told him, I got ten million dollars and I'll go in that Refinery and cut the price[10] so bad that nobody will be making money on big jobs."[11] Both Cappetta and Oriel specifically deny that Riley mentioned the $10 million figure; although neither specifically denied Riley's alleged statement of "The three guys that brought me up on charges to the Labor Board," I believe their numerous denials that Riley mentioned any names can reasonably be construed as a denial of this alleged statement.

Shortly thereafter, Cappetta informed Paul Pruss, Jr., herein called Pruss, vice president of Respondent Pruss, of his conversation with Riley and Oriel. About a week later (the next occasion that he was in the area) Pruss met with his employees at the Exxon refinery 1 day during lunch and informed them that he had heard a complaint about another contractor's equipment, he did not approve of any shenanigans, and he did not want any problems with any of the contractor's including Riley. No names were mentioned.

On May 9, 1980, Respondent Pruss discharged or laid off Ens Jr., Ens Sr., and Ricks. Ens Jr. was employed by Respondent Pruss as an operator driver at their Bayway, New Jersey, location—driving a truck and operating some of its chemical cleaning equipment. When he arrived for work on May 9, 1980, he found a note left for him at Respondent Pruss' clothes trailer at the Exxon refinery. The note stated: "Fred Ens, Jr. Please leave your PCS card and Badge with Tommy. Paul is reforming the acid company seperate [sic]. So you are laid off temp. and Golie." It was signed "Ron."[12] Nothing was said to him about it and nobody was there for him to question. He had lost his PCS (prescription card), but he did leave his badge in the office and left. Fell testified that Ens Jr. was laid off for lack of work, as was Ricks and they were chosen because they had the least seniority. Ens Jr. was recalled to work by Respondent Pruss in August 1980; admittedly, when he returned to work for Respondent Pruss there was one employee—Flo Ruiz—working for them who had not been employed there when Ens Jr. was laid off. Ens Jr. filed a grievance with the union representing Respondent Pruss' employees. It was determined that an employee had been hired for a 2-day period in May 1980 and therefore Respondent paid Ens Jr. 2 days' backpay. His case for backpay for the entire period of his layoff (due to the presence of Ruiz and others) is still pending. Fell testified that there were occasions during Ens Jr.'s layoff when Respondent Pruss employed others: "We get jobs at the last minute from Exxon. We can't afford to call in and get people from outside which are already laid off. He may not be home. So we call the Bayonne refinery [another operation of respondent Pruss] and they have extra men, which they might be slow, they alternately send them over to us for a couple of days. We send them back again.

Ricks testified that on May 9, 1980, Fell handed him a layoff slip and said that he was going on vacation for 2 weeks and when he returned Ricks and Ens Jr. would be transferred to Respondent Pruss' Elizabeth terminal to work with Ens Sr. He was never recalled. Fell testified that Ricks was originally laid off for lack of work, although he was dissatisfied with Ricks because of his poor attendance record; he testified that from January through May 9, 1980, Ricks only appeared for work on or about 60 days, although he could have worked every day during that period but he was often out sick. Ricks testified that he could not remember whether he worked more or less than half the workdays during this period. After Ricks' layoff Respondent Pruss and the union representing its employees discussed the matter; Fell told the union that because of Ricks' poor attendance record he wanted to discharge him, rather than lay him off. The union determined that because of his poor attendance record he had not completed his probationary period and his layoff was converted to a discharge. No grievance or arbitration was filed regarding this layoff/discharge.

Ens Sr. was discharged by Respondent Pruss on May 9, 1980. Ens Sr. testified that, a day or two before Cappetta allegedly informed him of his conversation with Riley and Oriel, he was told by Fell to call Pruss, at the Philadelphia office. Pruss told him that he had a complaint from Ronnie Grue (who is in charge of chemical cleaning for Exxon in the area) that Ens Sr. did not use an inhibitor[13] on a certain job. Ens Sr. told him that he was wrong and that one of the employees who did the cleaning job with him was present and he could tell Pruss that they did use the inhibitor and Grue was a witness to it. Shortly thereafter, Ens Sr. met Grue and asked him about his complaint to Respondent Pruss that he (Ens Sr.) had not used an inhibitor in the acid; Grue told him that he never made such a complaint. About 2 days later while Ens Sr. was in Respondent Pruss' trailer with Cappetta, Grue walked in. He told Cappetta and Ens Sr. that he never made a complaint to Pruss and that he was

[10] As stated, *supra*, both Respondent Cambridge and Respondent Pruss are engaged in the same type of business and both perform work at the Exxon refinery. They were described as "friendly competitors." Ens Sr. testified that at one time Respondent Cambridge had almost all of the Exxon work, but that Respondent Pruss was "cutting in on them."

[11] Counsel for Respondent objected to the entirety of Ens Sr.'s testimony regarding the Riley, Oriel, and Cappetta conversation as hearsay. I overruled the objection on the ground that the statement was an admission and not hearsay under Fed. R. Evid. 801(d)(2). Although it is not entirely clear in the record, my ruling was meant to apply only to Respondent Pruss, the only one of Respondents for which Cappetta is an agent. It appears to me that there is no way that Respondent Cambridge can be bound by Cappetta's alleged statements to Ens Sr. and even the General Counsel appears to agree, when he stated: "Do his statements bind Cambridge? Probably not."

[12] Although there is no allegation in the consolidated amended complaint that "Ron" (Ron Fell) is a supervisor for Respondent Pruss, Respondent Pruss admits the allegation of the consolidated amended complaint that Ens Jr. was laid off on or about May 9, 1980. "Tommy," the name in the note, was his foreman that day.

[13] An inhibitor is a chemical that is put into the acid (hydrochloric acid or phosphoric acid) that is used to clean tanks, exchangers, pipes, and lines at the refinery. The inhibitor stops the acid's reactions after the cleaning job has been completed.

present when Ens Sr. and his crew put the inhibitor in the acid.

Ens Sr. testified further that about 2 weeks later he saw Pruss outside Respondent Pruss' trailer in Bayway and the first thing that was said was Pruss said to him, "You're a liar." Pruss then spoke about people damaging his equipment and how expensive it was to repair the equipment. They then walked into the trailer and Pruss again called Ens Sr. a liar. Ens Sr. told him that the next time he called him a liar without a reason he would hit him. Pruss then said that he could not think straight because he was taking his medicine and that he was not going to lose everything that he and his father had worked for. Ens Sr. said he did not know what he was talking about and that was the extent of that conversation.

About 2 weeks later (May 9, 1980) Pruss called Ens Sr. to his office at the end of the day. Cappetta was present also. Pruss took some papers from his briefcase and handed them to Cappetta who looked them over and returned them to Pruss. Pruss said to Ens Sr. that he lied on his employment application; Ens Sr. asked how he lied and Pruss said, "I had a check run on you and you served time."[14] Ens Sr. said, "You think that's something to be proud of? I go around bragging about that? Why didn't you ask me about it and I would have told you." Pruss told him that he was going to have to let him go and gave him his paycheck and a check for a week's vacation. Ens Sr. asked if there were any chance of his returning to Respondent Pruss and Pruss said that he could not think straight. Ens Sr. walked out of the office with Cappetta, who told him, "Give him a day or two to calm down." He never returned to the employ of Respondent Pruss.

On June 26, Ens Sr. filled out an application for employment for Respondent Pruss.[15] One of the questions asked is: "Have you ever been convicted of a crime, excluding misdemeanors and summary offenses?" He answered "no." On direct examination (prior to the introduction of his employment application) Ens Sr. was asked how he answered this question and he testified: "I actually don't know if I filled it out." On cross-examination, Ens Sr. repeated that he did not know whether he answered that question; when asked why he did not state on the application that he had been convicted of a crime, he testified: "Because when I asked Vic Cappetta should I fill that all out, he said all they want is name, social security number and deductions." When he was asked whether the application asked for a lot more than that, Ens Sr. testified that he did not know what else he filled out; "It was one of those deals where I met the fellow [Cappetta] on the outside of the gate. When I asked him, you want me to fill out all this stuff, and he said you are hired."

Cappetta testified that he did not personally know Ens Sr. prior to his employment at Respondent Pruss, but he had seen him at the Exxon refinery while he was employed at Respondent Cambridge, and he did not know that Ens Sr. had a prison record at the time he was hired by Respondent Pruss. He learned of it about a month prior to Ens. Sr.'s discharge from Pruss who told him: ". . . he had a record. He had been in prison . . . we all know it now. For this reason, we can't tolerate this kind of character." Cappetta also testified that he gave Ens Sr. the employment application to fill out and expected him to "fill it out thoroughly"; he testified that he did not tell Ens Sr. simply to fill out his name, address, and social security number on the application. After he gave Ens Sr. the employment application he left and did not see it again; it went to Respondent Pruss' office in Philadelphia.

Fell testified that while Ens Sr. was employed by Respondent Cambridge he saw him at the refinery and, occasionally, spoke to him, just as he spoke to the other employees of Respondent Cambridge, but he did not learn that Ens Sr. had a prison record until Pruss informed him of it about 2 weeks or a month prior to his discharge. Pruss told him that he had done the check because they were losing a lot of tools. According to Fell's testimony, Ens Sr. was not discharged at that time because they were in the middle of a job and they needed him until the job was completed. Fell also testified that during the period of the employment of Ens Sr. and Ens Jr. many tools started disappearing. Although they did not speak to them about the missing tools, Respondent Pruss "just assumed" that they were responsible for the loss of these tools; he discussed this loss with Pruss and that was another reason for the discharge of Ens Sr.

Pruss testified that in about February or March 1980 Cappetta and Fell informed him that some of their equipment was missing. About a month later he received an "anonymous tip" that one of his employees "may have an unsavory background." In regard to this "tip" he testified to the following: ". . . [it] sort of like got around through the grapevine back to me. . . . I don't even remember [whom he heard it from]. I was bullshitting with a couple of guys in the smoke shanty, that kind of thing. . . . Like I said, I heard scuttlebutt. They said something to the effect that did you know that Fred Ens was in jail, or something like that, and I said no, what are you talking about? And they said well, you'd better check it out. That was the extent of the conversation. That's when I called the investigator. . . In other words, this party came to me and said hey, I heard the man had a record. But I don't want to be accused."

After the conversation, Pruss examined Ens Sr.'s employment application and saw that he did not list any conviction; he then employed a private investigator to check into Ens Sr.'s background (this was about a month prior to Ens Sr.'s discharge). As to why he employed the investigator, Pruss testified:

> Well, a combination of things. Equipment started to disappear from some of our locations. We couldn't point a finger on anybody, but it just didn't add up. The thing wasn't making sense that all of a

[14] Ens Sr. went to prison for receiving stolen property, larceny, and bookmaking. This occurred in 1973 while he was employed by Respondent Cambridge. After being in prison for about 6 months he was eligible for the work release program and returned to Respondent Cambridge's employ at that time.

[15] The application states, *inter alia*: "I hereby certify that the facts set forth in the above employment application are true and complete to the best of my knowledge. I understand that if employed, falsified statements on this application shall be considered sufficient cause for dismissal."

sudden after so many years the equipment is starting to walk off the job the way it did.

So when this subject was brought up about Ens Sr. I called this private investigator and asked his opinion. He said better check it out. I said okay, go ahead, and that's what I did. You know, I retained him to investigate.

Sometime thereafter, Pruss received a certified statement from the clerk of Union County, dated April 29, 1980, certifying to Ens Sr.'s convictions. He testified that he waited until May 9, 1980, to discharge him because he was in the middle of a job, for which he needed him, and waited until the job was completed. Pruss also testified this was not the first occasion when equipment and tools were missing; "I mean occasionally guys will lose a tool. But you don't start losing hundreds of dollars worth of equipment in a matter of weeks, and it just walks off the job." He then testified: "The equipment problems was going on for a period of months, because both Ronnie Fell and Vic Cappetta complained to me about it. . . . And then it sort of came to a head when this stuff was brought to my attention that Mr. Ens had an unsavory background. And I might add that since these people are no longer with me, I'm not losing the hundreds of dollars worth of tools anymore, either."

On rebuttal, Ens Sr. testified that while employed by Respondent Pruss he used his own tools, and at the beginning of his employment there, Fell informed him that tools were being left on the job are stolen, and named two employees whom he thought were taking the tools—George Heinkel was the name he remembered.

V. ANALYSIS AND CONCLUSION

Where there are credibility issues to be resolved (which is not too often herein) I would credit Respondent's witnesses over Ens Sr., Ens Jr., and Ricks. Respondents' witnesses, and most especially Oriel and Miller, appeared to me at the hearing to be testifying in a frank and truthful manner. Although Ens Sr. and Ricks did not appear obviously untruthful in their testimony, there were aspects of their testimony that indicated to me that they were not being entirely truthful. Ens Sr. initially testified that he did not know if he answered the question on Respondent Pruss' employment application regarding convictions for a crime. It appears to me that an individual applying for a job who had recently been in prison would look hard and long at that question; the attitude of society being what it is, he must have been fearful that if he answered yes he would not get the job, while, at the same time knowing that if he answered no, and his background were discovered, he could be summarily discharged. It is certainly not the type of question that Ens Sr. would forget. For that reason I would find that Ens Sr.'s testimony lacked some credibility.

My reason for finding Ricks' testimony somewhat less than credible is not as obvious as my reason stated *supra* regarding Ens Sr. Ricks began working for Respondent Pruss on December 31 and worked there until May 9, 1980. Respondent Pruss' witnesses testified to Ricks' extremely poor attendance record during his employment there, testifying that of the 90 to 95 workdays during this period Ricks only appeared for work on or about 60 days, although he could, and should, have worked every day. Ricks' testimony that he could not remember how many days he worked or whether he worked more or less than half of the available workdays during this period does not ring true to me. It would appear to me that an employee beginning employment with a new employer would be more cognizant of his attendance record, at least for the first few months, and especially if he were absent from work as often as Ricks was. Additionally, Ricks appeared to me to be somewhat evasive at times in his testimony. Lastly, because I found Miller to be a frank and truthful witness, I would credit his testimony that he purchased marijuana from Ens Jr. and, where necessary, I would credit his testimony over that of Ens Jr.

The first issue to be decided (pursuant to the order of Associate Chief Administrative Law Judge Dyer) is whether Respondent Cambridge violated the terms of the informal settlement agreement entered into on January 24, 1980. In that agreement Respondent Cambridge agreed, *inter alia*, that it would not discharge or otherwise discriminate against its employees because of their membership in Local 394 or any other labor organization and it would not, in any like or related manner, interfere with, restrain, or coerce its employees in the exercise of rights guaranteed in Section 7 of the Act.

Settlement agreements will not be set aside absent a breach of their provisions or the commission of subsequent unfair labor practices. *Mohasco Industries, Inc. (Laurens Park Mill)*, 172 NLRB 2079 (1968); *Sundstrand Castings Company and Sundstrand Corporation*, 209 NLRB 414 (1974). The basis of the General Counsel's allegation that the settlement agreement should be set aside is the April 1980 conversation between Riley, Oriel, and Cappetta; this is the only basis for the General Counsel's allegation since there is no allegation that Respondent Cambridge engaged in any other unfair labor practices subsequent to January 24, 1980.

I have found, *supra*, that Ens Sr.'s testimony regarding his conversation with Cappetta about his April 1980 conversation with Riley and Oriel is hearsay as to Respondent Cambridge and is binding only upon Respondent Pruss as an admission under Federal Rules of Evidence 801(d)(2). It would therefore be of no assistance in overturning the settlement agreement and so Ens Sr.'s version of this conversation will be temporarily put aside. Cappetta's and Oriel's version of this conversation is that Riley told Cappetta that damage had been done to his equipment and it had to stop. Cappetta asked Riley 9 or 10 times who did it, but Riley refused to tell him. The only difference between their testimony regarding this conversation is that Cappetta testified that Riley said that he would take some unspecified action if the damage did not stop (Oriel never testified to this) and Oriel testified that Riley told Cappetta "he was pretty sure he knew who did it."

The logical question that arises is why did Riley and Oriel speak to Cappetta at all if they refused to divulge the name of the person who they felt did the damage. The General Counsel would allege that, even absent the

naming of the alleged culprits, the purpose of the visit was in the nature of a signal to Respondent Pruss to take some action against Ens Jr., or Ens Jr. as well as Ens Sr. and Ricks. Just as I found Oriel to be a credible witness I find his explanation for the visit not unreasonable; one of their trucks had been damaged and they assumed (from what Miller told them) that the damage was done by Ens Jr.; they were afraid to single him out because they had been "stung" by the Labor Board settlement 3 months earlier, but they wanted the word sent out to all of Respondent Pruss' employees at the Exxon Bayway terminal (including Ens Jr.) that they did not want it to happen again. According to Oriel, it seemed like the safe way to accomplish their purpose.

On the basis of the above, I would find insufficient evidence to establish that Respondent Cambridge violated the terms of the January 24, 1980, settlement agreement. Their visit with Cappetta had a legitimate purpose and there is no probative evidence that it was accomplished in any unlawful manner. The January 24, 1980, settlement agreement will therefore be reinstated.

The remaining issue to be considered is whether the discharge of Ens Sr. on May 9, 1980, violated Section 8(a)(1) and (4) of the Act and whether the discharge of Ricks on May 9, 1980, and the layoff of Ens Jr. from May 9, 1980, through August 1980 violates Section 8(a)(1), (3), and (4) of the Act. The consolidated amended complaint alleges that Respondent Pruss discharged or laid off Ens Sr., Ens Jr., and Ricks because they joined or assisted Local 394 or engaged in other protected concerted activities, and because they filed charges or participated in a Board proceeding under the Act; it is also alleged in the consolidated amended complaint that Respondent Pruss took this action because Respondent Cambridge requested it to do so.

I have found, *supra*, that Respondent Cambridge did not violate the January 24, 1980, settlement agreement by the visit of Riley and Oriel to Cappetta's office in April. I would likewise find that there is insufficient evidence to establish the allegations in the consolidated amended complaint that Respondent Pruss discharged or laid off Ens Sr., Ens Jr., and Ricks because Respondent Cambridge requested it to do so. As stated *supra*, Riley and Oriel had a valid reason for speaking to Cappetta (the damage to their truck) and they accomplished this task in a careful, lawful manner. Clearly, they never specifically asked that the employees be discharged or laid off and the evidence is insufficient to establish that this conversation was meant to serve as a signal to Respondent Pruss to take action against these employees.

The only allegation remaining, therefore, is that Respondent Pruss discharged or laid off Ens Sr., Ens Jr., and Ricks because of their activities on behalf of Local 394, other protected concerted activities, or their participation in the filing of, or participation in, a Board proceeding. This allegation must also fall. Without the assistance of the General Counsel's allegation that Respondent Cambridge instigated the discharge and layoff of Ens Sr., Ens Jr., and Ricks by Respondent Pruss, there is not a scintilla of evidence that these terminations were unlawful. Ens Jr., in his employment application with Respondent Pruss, stated that he had been discharged from his employment at Respondent Cambridge because of his union activity and he was hired nonetheless; additionally, Respondent Pruss' employees are represented by a union. As regards the allegation that they were terminated in violation of Section 8(a)(4) of the Act, the Board proceedings, at that time, involved only Respondent Cambridge and had no effect upon Respondent Pruss. Without finding that Respondent Pruss acted on May 9, 1980, against Ens Sr., Ens Jr. and Ricks as a favor to Respondent Cambridge or in fear of what Respondent Cambridge would do if they did not so act (which I have not found, *supra*.) there is no evidence that Respondent discharged Ens Sr. and Ricks, and laid off Ens Jr. in violation of Section 8(a)(1), (3), and (4) of the Act, and these allegations against Respondent Pruss will therefore be dismissed.

That is not to say that the discharges and layoff of Ens Sr., Ricks, and Ens Jr. are beyond suspicion. All occurred on the same day, about a month after the visit by Riley and Oriel. Respondent Pruss exlains this as being caused by a work slowdown and the fact that these individuals were the least senior employees. I am also skeptical regarding Ricks' discharge; it was originally a layoff, but when the layoff was grieved the union determined that he had not worked enough days to complete his probationary period, and the layoff was converted to a discharge; this appears to be contrary to the practice followed by unions I have observed. However, the General Counsel, in order to have his contentions sustained, must show more than establishing that Respondent's case is suspicious. Under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), he must establish "a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." The General Counsel has not sustained that burden herein.

CONCLUSIONS OF LAW

1. Respondent Cambridge Contracting, Inc. and Respondent Cambridge Chemical Corp., a single integrated business enterprise, is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Paul P. Pruss & Son, Inc., is an employer within the meaning of Section of 2(6) and (7) of the Act.

3. Local 394, Laborers' International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. Respondent Cambridge has not engaged in conduct in violation of the informal settlement agreement entered into on January 24, 1980.

5. Respondent Cambridge has not engaged in any conduct in violation of the Act as alleged herein.

6. Respondent Pruss has not engaged in any conduct in violation of the Act as alleged herein.

ORDER[16]

It hereby is ordered that the consolidated amended complaint be, and it hereby is, dismissed in its entirety.

IT IS FURTHER ORDERED that the informal settlement agreement entered into between the parties on January 24, 1980, and vacated and set aside by the Regional Director for Region 22 of the National Labor Relations Board on November 26, 1980, is hereby reinstated.

[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order.